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Nos. 08-289 and 08-294

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In The
Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION OF THE STATE OF ARIZONA,

Petitioner,

v.

MIRIAM FLORES, et al.,

Respondents.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

v.

MIRIAM FLORES, et al.,

Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTIONS PRESENTED

In 2000, the District Court concluded that Arizona violated the Equal Educational Opportunities Act of 1974 ("EEOA"), which requires states to "take appropriate action to overcome language barriers" for English Language Learners ("ELLs"). The District Court found that Arizona violated the EEOA because it failed to fund ELL instruction in a manner rationally related to the cost of the state's chosen instructional program.

1. In 2006, the Arizona Legislature enacted legislation to bring the state into compliance with the EEOA, but lower courts concluded that legislation failed to calculate funding for the state's ELL program in a manner that complied with the No Child Left Behind Act ("NCLB") and other requirements. In this context, does a state comply with the mandate of the EEOA to take "appropriate action" to overcome language barriers faced by English Language Learners (ELLs) because it complies with the NCLB's requirements to track aggregate student performance and intervene in underperforming schools.

2. Whether relief from the judgment in this case is appropriate under Rule 60(b)(5) if some specific conditions resulting from the violation of federal law have been ameliorated even if Arizona law fails to fund the calculated cost of the state's instructional program through legally available funds.

QUESTIONS PRESENTED – Continued

3. Whether the Ninth Circuit incorrectly interpreted the EEOA to require earmarked funding for English language instruction.

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INTRODUCTION

In January 2000, the District Court found that Arizona violated the EEOA because it failed to fund ELL instruction in a manner rationally related to the cost of its chosen instructional program. While the District Court noted resulting inadequacies in the instructional program in place in the Nogales Unified School District, applying the analysis set forth by the Fifth Circuit in *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), it declined to require any particular programmatic changes and instead mandated that Arizona fund its chosen instructional program in a way that was rationally related to the cost of that program.

Arizona did not appeal the judgment. Instead, the state attempted to comply by providing additional interim funding and spending the subsequent six years attempting to design a system of funding that would be rationally related to instructional cost. In March 2006, Arizona enacted legislation – House Bill 2064 – establishing a system intended to do just that.

Since 2006, the proceedings in this case have necessarily focused on HB 2064, which now governs ELL instructional funding in Arizona. The unique issues associated with HB 2064 make this case a poor vehicle for reviewing the questions that the petitions present.

In order to address the questions presented by the petitions, the Court would need to resolve whether Arizona is in fact in continuing violation of

the law based on the provisions of HB 2064 – an issue that neither petition for certiorari in this case raises but which controlled the result below. Specifically, the lower courts held that HB 2064 runs afoul of federal laws that govern the use of federal educational funds granted to the states for elementary and secondary instruction, including the NCLB itself.

HB 2064 builds on Arizona's existing system of statewide funding for instructional programs, creating a process where each school district would calculate the cost of implementing a prescribed instructional program in that district and then would request state funding consistent with the calculated cost. But HB 2064 relies on federal funds to meet that calculated cost and cuts off most state funding entirely after two years, regardless of student progress in overcoming language barriers. The unique legal problems raised by the state's use of federal funds in the calculation of state aid for its ELL program and the two-year limit on most ELL funding make this case an inappropriate vehicle to review the standards for relief under Rule 60(b) and the interplay between NCLB and the EEOA. Accordingly, there is no basis for certiorari at this time.

STATEMENT

I. Procedural History of This Litigation Prior to the Passage of HB 2064

Plaintiffs, a group of ELL students and parents of ELL students in the Nogales Unified School District, filed this lawsuit in 1992, naming as defendants the State of Arizona, the Arizona State Board of Education, and the Superintendent of Public Instruction for the State of Arizona. Plaintiffs asked for declaratory relief regarding the State's alleged failure to comply with, among other things, its obligations to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs," as required by the EEOA. Appendix to Petition in No. 08-289 ("Superintendent's App.") 196 (20 U.S.C. § 1703(f)).

In January 2000, the District Court entered a declaratory judgment in favor of Plaintiffs on their EEOA claim. Applying the three-prong analysis developed by the Fifth Circuit in *Castaneda v. Pickard*, 648 F.2d 989, 1008-09 (5th Cir. 1981), the District Court found that while Arizona had chosen an ELL instructional program within the appropriate bounds of its discretion, its funding for the chosen program was arbitrary and capricious and bore no relation to the actual funding needed to meet the State's obligations under the EEOA. *Flores v. State of Arizona*, 172 F. Supp. 2d 1225, 1238-39 (D. Ariz. 2000), Appendix to Petition in No. 08-294 ("Intervenors' App.") at 147-48a, 150-51a. The District Court

also made findings of fact regarding the effects of this lack of rational funding on the instruction available to ELL students in the Nogales district. Intervenors' App. 149-51a. The bipartisan group of elected officials responsible for acting on behalf of the State defendants at that time did not appeal from the judgment.

For the next four years, acting on motions filed by the Plaintiffs, the District Court issued a series of orders setting deadlines for the state to provide appropriate funding for ELL programs. (Clerk's Record ("CR") 222, 226, 233, 249, 290.) None of those orders prescribed any specific program for ELL instruction to be pursued by the State; rather they required that the State provide funding for the actual cost of its chosen ELL instructional program. (*Id.*) None of those orders were appealed.

Except for an interim funding measure passed in 2002, no ELL funding legislation was enacted, and in December 2004 Plaintiffs filed a Third Motion for Injunctive Relief. (CR 284.) The District Court granted that motion, stating that "[t]hus far, the legislature has failed to meet the Court's deadlines as well as their own." (CR 290 at 5). The District Court then ordered "that the legislature comply with the Court's January 2000 Declaratory Judgment by the end of this legislative session." *Id.* The executive and legislative branches of state government could not reach agreement on legislation and the deadline was not met.

In August 2005, Plaintiffs filed another motion for sanctions, asking that sanctions be imposed with a thirty-day grace period to permit the executive and legislative branches to enact legislation to bring the State into compliance. (CR 296 at 7-8.) Plaintiffs suggested an injunction prohibiting the State from receiving federal highway funds as an appropriate incentive to foster compliance. (*Id.* at 9.) The State, the State Board of Education, and the Superintendent all opposed Plaintiff's motion, arguing that sanctions of any kind were inappropriate and asking for additional guidance from the Court regarding the meaning of its orders to assist in breaking an impasse between branches of government regarding what was required to bring the State into compliance. (CR 303.)

The District Court granted the sanctions motion on December 15, 2005, but declined to enjoin Arizona's access to highway funds, noting its obligation to use "the least possible power" to ensure compliance with its orders. Intervenors' App. 171a. The District Court instead gave the State until January 25, 2006 to pass legislation complying with the Court's prior orders, with daily monetary fines to commence after that date and to be imposed, on an escalating scale, until legislation was passed. Intervenors' App. 173a. The District Court again did not prescribe any particular educational program or level of funding, merely legislation that would comply with its prior orders requiring that Arizona rationally fund the ELL instructional program of its choice. Intervenors' App. 156a. The District Court also declined to address a

funding issue raised by the defendants, namely, whether federal funds made available under the NCLB and other statutes could be used to meet Arizona's obligations to fund ELL instruction. Intervenors' App. 168a. Because Arizona had not enacted legislation or otherwise sought to actually rely on those funds, the District Court reasoned, a ruling on the legality of using federal funds would be an impermissible advisory opinion. *Id.* The Superintendent appealed from the sanctions order.

On March 2, 2006, the Legislature passed HB 2064, which was expressly intended to comply with the District Court's orders. Intervenors' App. 286-334a. On March 3, 2006, the Governor issued a written statement of her intent to allow the bill to become law without her signature and the State advised the District Court that legislation had been passed. (CR 373, 376.)[1]

On March 8, 2006, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate (the "Intervenors") filed a motion to intervene principally to "defend the plan for English Language Learners ("ELL") adopted by the Arizona Legislature in H.B. 2064." (CR 382 at 1.) By that

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[1] The State further requested permission to distribute the accumulated fine monies to Arizona school districts for their use in educating ELL students, rather than have them paid into the court, and the District Court granted that request. (CR 395.) The fines were subsequently vacated by the Ninth Circuit and are not at issue in this petition.

time, the Superintendent of Public Instruction had also obtained separate counsel. (CR 316, 327.)

II. House Bill 2064

HB 2064 builds on Arizona's existing system of funding the instruction of all elementary and secondary students. Since 1981, Arizona has provided most funding for elementary and secondary instruction in Arizona using a per-student funding formula applicable statewide. *See* 1981 Sess. Laws Ch. 1 § 2.

Arizona funds the maintenance and operation of its public schools through a combination of state aid and local property taxes. Pursuant to the Arizona Constitution's mandate of a "general and uniform" school system, the system of funding applies statewide and the combination of state and local funding is "equalized" to ensure that the funding provided to a school district to educate its students is not limited by the district's property wealth. ARIZ. CONST. art. XI, § 1(A); A.R.S. § 15-971.

The process for equalizing the funds available to a school district is based on the number of students actually enrolled in that district, "weighted" to take into consideration the varying costs associated with educating different students, including their grade level and the size and location of the school district. A.R.S. § 15-943 (calculating "base support level" based on weighted student count); *see also* § 15-945 (additional funds for transportation costs calculated based on the number of eligible students

transported).[2] The student count used to calculate maintenance and operations funding available is also increased to account for additional costs associated with special student needs, including whether the student is an English Language Learner (ELL). A.R.S. § 15-543(2)(b).

HB 2064, like the Arizona statutes in place since the 1980s, distributed most of the funding that it provided to meet the needs of ELLs through an increase in the weight allocated to ELL students in calculating a school's base support level (the "Group B weight"). Specifically, HB 2064 increased the Group B weight for ELL students – the extra amount of funding a school district gets for each ELL student enrolled – from $365 to $444. Intervenors' App. 319-22a (HB 2064 § 6 (amending A.R.S. § 15-943)). However, this increase was expressly contingent on an order from the District Court in this litigation finding that HB 2064 "addresses the orders in the case" and, at least on an interim basis, "permit[s the] act to be fully implemented to determine whether the resulting ELL plans and available funding to implement the plans bear a rational relationship to the cost of implementing appropriate language acquisition programs."

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[2] School districts receive separate state and local funding for capital expenses, again based on student count but without the weighting used for maintenance and operations funding. *See* A.R.S. § 15-962; *see also* A.R.S. §§ 15-2001 through -2041 (capital facilities funding based in part on population of students using a facility).

Intervenors' App. 333-34a (HB 2064 § 15). Because the District Court has consistently found that HB 2064 is inadequate to comply with the judgment, the increased Group B weight has never taken effect.

It also provided a supplemental funding stream based on any additional costs in excess of the Group B weight amount (the "SEI Fund"). The SEI Fund is a new mechanism, created by the Legislature in HB 2064 and designed to supplement the Group B weight to the extent necessary to meet the requirement that the State's funding of ELL instruction be rationally related to the cost of whatever ELL instructional program it has chosen. If the cost of implementing the chosen, State-approved instructional model is more than the $365 or $444 per student provided through the Group B weight, then the school district may request additional monies from the SEI Fund. *Id.*

However, HB 2064 does not permit the school district to actually obtain, from the State, the entire amount of incremental ELL instructional costs that the Group B weight fails to cover. Instead, the school district must subtract from any request a percentage (based on the number of ELLs in the district) of the funds received by that district under Titles I and II of the Elementary and Secondary Education Act (ESEA), desegregation funds raised through local tax revenues, and impact aid provided to offset the presence of non-taxable lands in the school district's tax base, as well as the entire amount received by the

district under Title III of the ESEA. Intervenors' App. 284-86a (A.R.S. §15-756.01(I)).

HB 2064 also establishes a compensatory instruction fund ("CIF"); however, the use of the fund is limited. A.R.S. § 15-756 11. Under the Act, CIF monies are to be used for "programs *in addition to normal classroom instruction* that may include individual or small group instruction, extended day classes, summer school or intersession school." Intervenors' App. 306a (A.R.S. § 15-756.11(G)) (emphasis added). The programs are "limited to improving the English proficiency of current English language learners and pupils who were English language learners and who have been reclassified as English proficient within the previous two years." *Id.* No set amount will be appropriated to the fund on an annual basis, and grants from the fund are within the discretion of the Superintendent. Intervenors' App. 304-06a (A.R.S. § 15-756.11).

Group B weight monies, SEI funds, and Compensatory Instruction dollars are all available to ELL students for two years. However, HB 2064 cuts off the majority of the state monies – Group B weights and SEI funds – for any student who remains classified as an ELL for more than two years: "Monies from the [SEI] Fund established by this section and monies for the ELL support level weight prescribed in section 15-943 [Group B Weights] shall not be distributed for more than two fiscal years for the same pupil." Intervenors' App. 291a (A.R.S. § 15-756.04(C)); *see also* Intervenors' App. 321a (A.R.S. § 15-943(2)) (including

same limitation in Group B weight statute); Intervenors' App. 285-86a (A.R.S. § 15-756.01(J)) (prohibiting school districts from including in their SEI budget request the "incremental costs" of any student "who has been classified as an English language learner for more than two years").

ELL students can continue to receive Compensatory Instruction services so long as they are classified as ELL students. However, Compensatory Instruction services are specifically defined to exclude normal classroom instruction of the type ELL students presumably will receive during the first two years from the Group B weight and SEI funds. Intervenors' App. 306a (A.R.S. § 15-756.11(G)). In addition, ELL students who score at or above a designated score for English proficiency are to be reclassified as English Proficient. Intervenors' App. 293a (A.R.S. § 15-756.05(B)). English Proficient students can receive only Compensatory Instruction programs and dollars and only for two years. Intervenors' App. 306a (A.R.S. § 15-756.11(G)). The effect of these time limits is to reduce funding for ELL students who have been in ELL programs for two years to approximately $74 per ELL, based on the current discretionary appropriation for the CIF. Intervenors' App. 108a (Finding of Fact 20).

III. Procedural History After the Enactment of HB 2064

At the urging of all the parties, the District Court examined HB 2064 to determine whether it complied with that Court's prior orders and the EEOA by funding ELL instruction in Arizona in a manner rationally related to its cost. The District Court concluded that HB 2064 did not do so, addressing for the first time the use of federal funds issue on which the State and the Superintendent had previously sought the court's guidance. Because HB 2064 impermissibly relied on and considered federal funds in setting the amount of state aid for ELL instruction, and also because of the two-year limitation on most funding for ELL instruction, the District Court held that HB 2064 did not comply with the EEOA or the prior orders. Intervenors App. 186-87a. The District Court therefore also denied the Intervenors' Rule 60(b) motion to set aside the judgment. Intervenors' App. 177a.

The Superintendent and the Intervenors appealed to the Ninth Circuit, and their appeal was consolidated with the Superintendent's pending appeal from the December 2005 order granting the Plaintiffs' motion for sanctions and setting deadlines for compliance. The Ninth Circuit declined to address the substance of the District Court's rulings, instead vacating all orders appealed from and remanding for an evidentiary hearing on the petitioners' allegations of changed factual circumstances in the Nogales

Unified School District and in Arizona's school finance system. Intervenors' App. 189-90a.

After an evidentiary hearing, the District Court again concluded that Rule 60(b) relief was unavailable because of the flaws in HB 2064. Regardless of any improvements in classroom conditions that the Nogales Unified School District had made in the intervening years since the judgment, the Court reasoned, the illegality of the funding scheme chosen by the Legislature to govern future ELL instruction throughout Arizona precluded a finding of either compliance with the Court's orders or a basis to set aside those orders. Intervenors' App. 112-15a.

The District Court also made factual findings regarding the effects of HB 2064's flaws on the adequacy of the State's support for the ELL instructional programs chosen by the Legislature. Specifically, the District Court found that the Group B weight amount provided for in HB 2064, even if increased to $444 per student upon court approval,[3] was still less than the incremental costs of instruction based on the evidence presented at the hearing, thus requiring schools to look to the SEI Fund to satisfy their funding needs and thereby triggering the federal law violations associated with the calculation of amounts available to schools from that Fund. Intervenors' App. at 104-05a (Finding of Fact 10). The District Court further

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[3] Because the District Court has not approved HB 2064, no school district actually receives $444.

found, based on testimony and evidence presented at the hearing, that the two-year limitation on Group B weight and SEI Fund monies would have a substantial impact on ELL instruction because many students need more than two years of instruction to be reclassified as English proficient. Intervenors' App. 108-09a (Findings of Fact 21-23).

The Ninth Circuit affirmed. Applying the standards articulated by this Court in *Agostini v. Felton*, 521 U.S. 203 (1997) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367 (1992), it found that neither the underlying facts nor the governing law had changed sufficiently that the District Court abused its discretion in refusing to modify the judgment. Articulating the standard as that applicable in the absence of compliance – whether "a prior judgment is so undermined by later circumstances as to render its continued enforcement inequitable even though neither appealed nor complied with" – the Ninth Circuit examined the proffered changes of fact and law and found each insufficient to call for modification of the judgment. Intervenors' App. 60a (*Flores v. State of Arizona*, 516 F.3d 1140 (9th Cir. 2008)).

On the issues of fact, the Ninth Circuit affirmed the District Court's conclusion that the moving parties had failed to demonstrate either that the extra help needed by ELL students no longer costs extra money or that the funding scheme chosen by the Legislature as the means of meeting those costs was enough to do so, particularly in light of continued problems with student performance in the Nogales

district. Intervenors' App. 63-72a. On the issues of law, the Ninth Circuit found that NCLB neither expressly nor impliedly preempted EEOA. The Ninth Circuit found that NCLB's requirement of monitoring and gradual statewide improvement was fundamentally different from the EEOA's guarantee to each ELL child, each year, the educational support necessary to overcome language barriers. Intervenors' App. 72-81a. The Ninth Circuit concluded by examining HB 2064, noting that it does control Arizona's funding of ELL instruction now and in the future, and affirming the District Court's findings and conclusions regarding HB 2064's violations of NCLB (by considering federal funds) and the EEOA (by limiting most ELL funding to two years). Intervenors' App. 81-90a.[4]

REASONS TO DENY THE PETITIONS

I. The Unique Issues Raised by Arizona's Chosen ELL Funding Scheme Make this an Inappropriate Vehicle for Examining the Relationship Between NCLB and the EEOA.

Both petitions urge this Court to grant certiorari to resolve the question of what the EEOA requires, in light of the 2001 enactment of NCLB. They contend

[4] The Ninth Circuit declined to reach the issue of HB 2064's violation of the restriction on supplanting, which it deemed unnecessary to its decision. Intervenors' App. 88a n.53.

that, because NCLB sets out monitoring and accountability requirements for ELL instruction (as well as other aspects of the public schools), compliance with NCLB must constitute "appropriate action to overcome language barriers" under the EEOA. Intervenors' Petition at 29-33; Superintendent's Petition at 22-32.

Petitioners do not assert that there is any circuit split for this Court to resolve concerning the interplay between the NCLB and the EEOA. The question of statutory interpretation petitioners raise is resolved by the language of the NCLB, which expressly disclaims any intent to affect pre-existing laws. 20 U.S.C. § 6847 ("[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right"). Both the EEOA and the NCLB relate to the instruction of ELLs, but they advance the instruction of those students through different means. NCLB conditions receipt of federal grant monies on monitoring the aggregate progress of students and fulfilling self-imposed requirements for gradual progress of those students. Intervenors' App. 263-67a (20 U.S.C. § 6842(a)(3)(A)) (requiring school to make annual increases in the percentage of children progressing toward English proficiency). The EEOA, in contrast, requires assistance for all ELL students at all times so that those students can overcome language barriers, rather than gradual progress of some percentage of ELL students, and it provides a private right of action to enforce its mandate. Superintendent's App. 196 (20 U.S.C. § 1703(f)).

Treating compliance with the NCLB as satisfying the requirements of the EEOA would be inconsistent with the guarantees of the EEOA.

This is also the wrong case to address the issue that petitioners raise concerning the NCLB and the EEOA because Arizona's current funding scheme for ELL instruction does not comply with the NCLB and puts Arizona potentially at risk of losing millions of federal educational dollars. 20 U.S.C. § 7902 prohibits a State from taking "into consideration payments under this Act (other than under Title VIII) in determining eligibility of any local educational agency (LEA) in the state for state aid, or the amount of state aid, with respect to free public education of children."[5] App. 6 (20 U.S.C. § 7902). Under HB 2064's provisions establishing the SEI Fund, the amount of state aid a school district receives is determined by taking into consideration the amount of federal educational dollars a school district receives. The statutory formula calculates state aid by determining the cost of

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[5] The ELL instruction in grades K-12 provided by Arizona's public schools and funded by HB 2064 falls within the federal definition of "free public instruction of children" under 20 U.S.C. § 7902. *See* App. 6 (20 U.S.C. § 7801(21)) (defining "free public education" as "education that is provided – (A) at public expense, under public supervision and direction, and without tuition charge; and (B) as elementary school or secondary school education as determined under applicable State law, except that the term does not include any education provided beyond grade 12."); Intervenors' App. 286-334a (HB 2064) (providing funding for ELL instruction as part of the elementary and secondary programs of Arizona's public schools).

the program and then subtracting the amount of federal funds to determine the total amount of state aid. Intervenors' App. 284-86a (A.R.S. § 15-756.01(I)). Thus, even if compliance with NCLB were the benchmark for compliance with the EEOA, Arizona would still be out of compliance based on current facts and law, and the result in this case would remain unchanged. This case is therefore a poor vehicle for resolving the question of when a state, like Arizona, that complies with the monitoring and intervention parts of NCLB can rely on that compliance to demonstrate that it is taking "appropriate action" under the EEOA.

II. Even if the Ninth Circuit's Decision Had Conflicted with the Prior Decisions of this Court or Other Circuits, the Unique Issues Raised by Arizona's Chosen ELL Funding Scheme and the Procedural History of this Case Would Preclude Rule 60(b) Relief at this Time Under Any Available Standard.

The Intervenors also seek certiorari regarding the proper standard to be applied when a state government seeks modification of a federal court decree. They wrongly claim that the Ninth Circuit applied a standard inconsistent with that articulated by this Court and other Circuits, which they characterize variously as (1) whether continued enforcement is "detrimental to the public interest," (2) whether the decree has "proven to be unworkable," (3) whether

"the original decree could not properly have been issued on the state of facts that now exists," (4) whether there are "continuing 'violations of federal law,'" and (5) whether the "circumstances, whether of law or fact, obtaining at the time of its issuance have now changed, or new ones have since arisen." Intervenors Pet. at 22-26.

A review of the Ninth Circuit's actual decision reveals the petitioners' error. The Ninth Circuit looked to all of the factors petitioners articulate in reaching its decision, considering whether the underlying facts showed a lack of a continuing federal violation, whether the governing law had changed, and whether the State's current program of ELL instructional funding complied with federal law. Intervenors' App. at 63-90a. From that review, the Ninth Circuit concluded that despite some improvement in the performance of some ELL students, Arizona had not yet complied with the still-applicable mandate of the EEOA because of the issues raised by HB 2064, and that Rule 60(b) relief was therefore premature. On the "state of facts and law that now exist," the Ninth Circuit found that continued enforcement of the decree was appropriate. *See* Intervenors Petition at i. There is no inconsistency between the standard applied by the Ninth Circuit and that used in the prior decisions of this or other federal courts.

Moreover, no matter how flexible the standard petitioners would have this Court adopt, the petitioners do not articulate a basis for relief from a judgment

when the current law of a state is in direct violation of the federal law enforced by that judgment. This Court has been clear that "modification [under Rule 60(b)] must not create or perpetuate" a violation of federal law. *Rufo*, 502 U.S. at 391. The standards cited by the petitioners incorporate this notion, referring repeatedly to whether the facts and law existing at the time of the Rule 60(b) motion evidence ongoing violations of federal law.

To reach any issue of the proper formulation of the Rule 60(b) standard in this case, this Court would have to resolve questions concerning whether HB 2064 violates federal law, because HB 2064 controls funding for ELL instruction in Arizona. HB 2064 has been found to violate federal law in three respects.

First, HB 2064 has been found to violate the NCLB's prohibition on considering federal funds when determining the amount of state aid, as discussed above. *See* App. 6 (20 U.S.C. § 7902).

Second, HB 2064's two-year limitation on most ELL instructional funding has been found to violate the EEOA's requirement that the State take "appropriate action to overcome language barriers," because it makes no alternative provision for students who need more than two years to overcome those barriers. *See* Superintendent's App. 194 (20 U.S.C. § 1703(f)); Intervenors' App. 285-86a, 291a, 321a (A.R.S. §§ 15-756.01(J), 15-756.04(C), 15-943(2)).

Third, HB 2064 has been found to violate federal supplanting restrictions, potentially jeopardizing Arizona's entitlement to federal educational funds benefiting all students. States that receive Title I, IIA, and III funds must use them to add to ("supplement"), and not substitute for ("supplant"), the monies the State would otherwise spend on educating its students. App. 2 (20 U.S.C. §§ 6314(a)(2)(B)) (Title I school-wide programs); App. 4 (20 U.S.C. § 6315(b)(3)) (Title I targeted programs); App. 4-5 (20 U.S.C. § 6613(f)) (Title IIA grants to states); App. 5 (20 U.S.C. § 6623(b)) (Title IIA sub-grants to districts and charter schools); App. 5 (20 U.S.C. § 6825(g)) (Title III funds); *see also Indiana, Dep't of Pub. Instruction v. Bell*, 728 F.2d 938, 941 (7th Cir. 1984). A state that violates this restriction can be required to return previously received federal funds and disqualified from future grants of federal funds. App. 1 (20 U.S.C. §§ 1234c); *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 665 (1985); *Bell v. New Jersey*, 461 U.S. 773, 790-91 (1983). HB 2064 expressly reduces the amount of state aid for ELL instruction that a school district or charter school receives, dollar-for-dollar, by the full amount of the federal Title III funds and a proportional share of the other federal funds that district or school receives. *See* Intervenors' App. 284-86a (A.R.S. § 15-756.01(I)). The District Court therefore held that Arizona had also violated the prohibition on supplanting. Intervenors' App. 112-15a, 186-87a. The Ninth Circuit did not reach this issue, resting its conclusion regarding a continuing violation

of federal law on the first two federal law issues discussed above. Intervenors' App. 88a n.53.

In order to reach the question of the appropriate standard to be applied when a state government seeks relief from a federal court judgment in this case, the Court would first have to resolve whether Arizona is in fact in continuing violation of the law – notably, an issue that neither petitioner has identified as worthy of certiorari in this case. This case therefore presents an undesirable vehicle to address any issues regarding the application of Rule 60(b) that may remain after the Ninth Circuit's decision.

III. Neither the District Nor the Circuit Court Required Earmarked Funding Under 20 U.S.C. § 1703(f).

The Superintendent also urges this Court to issue a writ of certiorari to correct the Ninth Circuit's interpretation of 20 U.S.C. § 1703(f) as requiring "earmarked" ELL instructional funding. Superintendent's Petition at 8. The lower courts have imposed no such requirement – they have merely recognized that so long as Arizona chooses to fund ELL instruction from designated sources, as the Legislature did back in 1981 and again in enacting HB 2064, the funding it provides from those sources must be rationally related to the cost of ELL instruction and must meet that cost through legally-available funds. Intervenors' App. 110-11a, 115a, 150a, 177-79a.

Whether Arizona chooses to address ELL educational needs by continuing to fund ELL instruction from designated sources is up to Arizona's legislative and executive branches. That has been the method of funding all elementary and secondary education in Arizona for almost thirty years, beginning more than a decade before this lawsuit was filed and continuing through HB 2064. Nothing about the District Court's orders would preclude a change in this longstanding practice, provided that the resulting funding is rationally related to the actual cost of instructional programs and uses legally available funds. Certiorari is not needed to clarify whether the EEOA requires "earmarked" funding, because no such requirement has been read into that statute by the lower courts.

CONCLUSION

Both petitioners attempt to position this case as one involving crucial issues regarding the meaning of federal education statutes and the extent to which federal courts may intervene to enforce those statutes. The State agrees that these are important issues, but this is not the case in which this Court should address them. For six years, Arizona has struggled to reach consensus within its political branches on how to comply with the EEOA's mandate that states take "appropriate action" to enable ELL students to "overcome language barriers." A central issue in Arizona's struggle has been the extent to which the state can rely on federal funding when

calculating state aid for ELL programs. Petitioners ignore that issue in their petitions for certiorari. The Ninth Circuit and District Court decisions, however, provide guidance on that issue that should help state policymakers resolve the issues in this case. When Arizona has complied with the judgment, the State can and will seek relief under Rule 60(b).

Granting certiorari now would mire this Court in issues regarding HB 2064 and its compliance with federal law that control the outcome in this case and that would predominate over the issues actually raised by the petitions. The writ of certiorari should be denied.

Respectfully submitted,

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20 U.S.C. § 1234c. Remedies for existing violations

(a) Whenever the Secretary has reason to believe that any recipient of funds under any applicable program is failing to comply substantially with any requirement of law applicable to such funds, the Secretary may –

(1) withhold further payments under that program, as authorized by section 1234d of this title;

(2) issue a complaint to compel compliance through a cease and desist order of the Office, as authorized by section 1234e of this title;

(3) enter into a compliance agreement with a recipient to bring it into compliance, as authorized by section 1234f of this title;

or

(4) take any other action authorized by law with respect to the recipient.

(b) Any action, or failure to take action, by the Secretary under this section shall not preclude the Secretary from seeking a recovery of funds under section 1234a of this title.

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20 U.S.C. § 6847. Civil Right.

Nothing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right.

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20 U.S.C. § 6314. Schoolwide Programs.

. . . .

(B) Supplemental funds

A school participating in a schoolwide program shall use funds available to carry out this section only to supplement the amount of funds that would, in the absence of funds under this part, be made available from non-Federal sources for the school, including funds needed to provide services that are required by law for children with disabilities and children with limited English proficiency.

. . . .

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20 U.S.C. § 6315. Targeted assistance schools

. . . .

(b) Eligible Children –

(1) Eligible Population –

(A) In General – The eligible population for services under this section is –

(i) children not older than age 21 who are entitled to a free public education through grade 12; and

(ii) children who are not yet at a grade level at which the local educational agency provides a free public education.

(B) Eligible Children From Eligible Population – From the population described in subparagraph (A), eligible children are children identified by the school as failing, or most at risk of failing, to meet the State's challenging student academic achievement standards on the basis of multiple, educationally related, objective criteria established by the local educational agency and supplemented by the school, except that children from preschool through grade 2 shall be selected solely on the basis of such criteria as teacher judgment, interviews with parents, and developmentally appropriate measures.

(2) Children Included –

(A) In General – Children who are economically disadvantaged, children with disabilities, migrant children or limited English proficient children, are eligible for services under this part on the same basis as other children selected to receive services under this part.

(B) Head Start, Even Start, Or Early Reading First Children – A child who, at any time in the 2 years preceding the year for which the determination is made, participated in a Head Start, Even Start, or

Early Reading First program, or in preschool services under this title, is eligible for services under this part.

(C) Part C Children – A child who, at any time in the 2 years preceding the year for which the determination is made, received services under part C is eligible for services under this part.

(D) Neglected Or Delinquent Children – A child in a local institution for neglected or delinquent children and youth or attending a community day program for such children is eligible for services under this part.

(E) Homeless Children – A child who is homeless and attending any school served by the local educational agency is eligible for services under this part.

(3) Special Rule – Funds received under this part may not be used to provide services that are otherwise required by law to be made available to children described in paragraph (2) but may be used to coordinate or supplement such services.

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20 U.S.C. § 6613. State Use of Funds.

. . . .

(f) Supplement, Not Supplant – Funds received under this subpart shall be used to supplement, and

not supplant, non-Federal funds that would otherwise be used for activities authorized under this subpart.

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20 U.S.C. § 6623. Local Use of Funds.

. . . .

(b) Supplement, Not Supplant – Funds received under this subpart shall be used to supplement, and not supplant, non-Federal funds that would otherwise be used for activities authorized under this subpart.

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20 U.S.C. § 6825. Subgrants to Eligible Entities.

. . . .

(g) Supplement, Not Supplant – Federal funds made available under this subpart shall be used so as to supplement the level of Federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for limited English proficient children and immigrant children and youth and in no case to supplant such Federal, State, and local public funds.

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20 U.S.C. § 7801. Definitions.

Except as otherwise provided, in this Act:

. . . .

(21) Free Public Education – The term "free public education" means education that is provided

(A) at public expense, under public supervision and direction, and without tuition charge; and

(B) as elementary school or secondary school education as determined under applicable State law, except that the term does not include any education provided beyond grade 12.

. . . .

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20 U.S.C. § 7902. Prohibition Regarding State Aid.

A State shall not take into consideration payments under this Act (other than under title VIII) in determining the eligibility of any local educational agency in that State for State aid, or the amount of State aid, with respect to free public education of children.